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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

W. A. NAILLING,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. 1042

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

L. E. GWINN,
Counsel for Petitioner,
W. A. Nailling.

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No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Dr. W. A. Nailling, petitioner herein was convicted on Counts X to XVII of an indictment in seventeen counts which charged sales of morphine sulphate in violation of Section 2554 of the Internal Revenue Code (U. S. C., Title 26), and acquitted on the others. He was sentenced to pay a fine of $1250 and to serve five years in a federal prison under each of the eight counts

on which he was convicted, the prison sentences to run concurrently. (R. 32, 33.)

The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment by an order which recites that no motion for a directed verdict was made but that the court had examined the record to determine whether there had been a miscarriage of justice and was satisfied that the evidence was sufficient to support the verdict. No other question was discussed in that order.

A petition to rehear was filed by counsel, employed after the affirmance of the judgment. That petition was answered by the Government, considered by the court, and denied in a written opinion, not yet officially published, but incorporated in the record and set out in the brief.

The action of the court on the issues first raised by the petition for a rehearing is the basis of this application for a writ of certiorari, and it has been incorporated in the record as a part of the proceedings in the Circuit Court of Appeals.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended, and within the time allowed therefor by Rule XI of the Rules of Practice and Procedure promulgated by this Court May 7, 1934.

Except as to dates, the counts on which petitioner was convicted were uniform, each charging the sale by petitioner of approximately five grains of sulphate morphine (R. 16-24) by "means of a purported prescription" on the date therein stated "for Harry Dezonia,

calling for the amount of morphine sulphate'' set out in the count (R. 16-24). The dates of the several prescriptions, as alleged in the counts on which petitioner was convicted, were June 1, 3, 4, 5, 6, 7, 8 and 9, respectively (R. 16-24).

Each of these counts charged a sale that was not made in pursuance of a written order on a form issued by the *''Commissioner of Internal Revenue.''*

Section 2554 of the Internal Revenue Code only prohibits sales that are not made on order forms issued by the ''Secretary'' of the Treasury.

Conceiving that the offense created by Section 2554 of the Internal Revenue Code is, as defined by this Court (Nigro vs. U. S., 276 U. S. 332, 345), a sale that is not made on a *''particular form of order,''* both the ''registered and unregistered seller'' being ''punished for not using the order forms as the statutes requires, or for misusing them,'' the petition to rehear pointed out that the indictment did not state an offense under the statute.

The Circuit Court of Appeals did not question the contention that the indictment did not state an offense under the statute as written, but holding that Treasury Regulations, made pursuant to statutory authority, had delegated the powers and duties of the Secretary of the Treasury with respect to order forms to the Commissioner of Internal Revenue, it sustained the indictment on the ground that it stated an offense under the *statute as modified by the regulations.*

But that conclusion, and irrespective of the constitutionality of any statute that delegates to an administrative official the power to change the terms of a statute, creating and defining a criminal offense, rests upon a false premise. The regulations, to which more specific reference is hereinafter made, confer upon the Commissioner of Narcotics, and not upon the Commissioner of Internal Revenue, all powers and duties with respect to order forms therein delegated.

The prosecuting attorney in alleging a sale that was not made in pursuance of an order form issued by the "Commissioner of Internal Revenue" followed a stereotyped form of indictment under the original statute which provided that the order forms should be issued by the Commissioner of Internal Revenue, and prosecutors generally have continued to use that form in drawing indictments under the amended statute which requires the order forms to be issued by the Secretary of the Treasury.

In that situation, the general importance of the question under consideration—one that may affect the validity of many pending and future indictments—is too obvious to require special emphasis.

The petition for a rehearing also pointed out that the conviction of petitioner herein rested upon an arbitrary and unconstitutional application of Section 2554 and exceptions thereto, applicable to physicians.

These counts involved prescriptions issued by petitioner to Harry Dezonia, an addict temporarily working in Union City, Tennessee, where petitioner owned

and operated a hospital, eight prescriptions being issued during a period of ten days, none exceeding Dezonia's reasonable requirement for a twenty-four-hour period for relief from the intense pain he was suffering. The addict, told by petitioner that he would only treat him for a limited period, and advised to enter a narcotic institution for treatment, informed petitioner that he had made arrangements to do so as soon as he completed his temporary work in Union City, confirming that statement by a letter from such an institution at Lexington, Kentucky (R. 113, 162, 163, 198, 200).

The precise questions involved in the contention that the statute was given an arbitrary and unconstitutional application, undisputed facts that are pertinent to a consideration thereof, and matters relevant in determining whether the indictment states an offense, will now be more specifically stated and shown.

Statute Involved.

The statute, which petitioner is alleged to have violated, reads as follows:

> "(a) *General requirement.* It shall be unlawful for any person to barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the *Secretary.*" (Italics ours.)

One of the exceptions to that Section, deemed relevant (Subsection (c), Paragraph I) to issues raised by this petition, is as follows:

> "Nothing contained in this section (2554), section 2563, or section 2564 shall apply—

(1) *Use of drugs in professional practice.* To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only: *Provided,* That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556."

The Indictment.

Omitting formal parts, count XVII, uniform with the others as to form and essential averments, reads as follows :

"That the defendant, W. A. Nailling, on or about the 9th day of June, 1940, at Union City, Obion County, Tennessee, and within the aforesaid division and district, within the jurisdiction of this Court, and who was then and there a physician dispenser in opium, morphine, cocaine, and other narcotic drugs specified in an Act of Congress of December 17, 1914, and amendments thereto, did unlawfully, knowingly, wilfully and feloniously sell, barter, exchange, dispense and give away approximately five (5) grains of morphine sulphate, a derivative of opium, the said selling, bartering, exchanging, dispensing and giving away of the aforesaid morphine sulphate not being in pursuance of a written order of the person to whom the said morphine sulphate

was bartered, sold, exchanged, dispensed, and given away, *on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States,* and was not dispensed, sold, bartered, exchanged, distributed and given away by the said defendant in the course of his professional practice only, nor in good faith, the said sale, dispensing, exchange, bartering and giving away aforesaid being accomplished by means of a purported prescription dated June 9, 1940, for Harry Dezonia, calling for the amount of morphine sulphate set out above."

Indictment Fatally Defective.

The petition for a rehearing challenged the validity of the above count and others of like tenor and substance, on the following grounds:

(1) It does not designate the purchaser.

(2) It does not charge that the prescription, alleged to be the means through which the sale was made, was issued by petitioner.

(3) The indictment charges that the sale was not made in pursuance of a written order on a form issued by the "Commissioner of Internal Revenue of the United States," and Section 2554 (a) requires that the order be written on a "*form to be issued by the Secretary*" (of the Treasury).

The rejection by the Circuit Court of Appeals of the third contention stated squarely raises the issue presented by the first question in this petition, to-wit:

(1) Whether Section 2554 of the Internal Revenue Code, creating and defining the offense for which peti-

tioner was convicted, has been or lawfully could, be so modified by Treasury regulations as to validate an indictment that does not state an offense under the statute as written.

In denying the petition to rehear, which challenged the sufficiency of the indictment, the Circuit Court of Appeals said:

> "And it appearing that while the indictment charges that the sale of morphine sulphate was not made in pursuance of a written order on a form issued by the Commissioner of Internal Revenue, and Section 2554 (a) requires that the order be written on 'a form to be issued' by the Secretary of the Treasury, the Secretary is authorized by statute to delegate and has delegated authority to the Commissioner of Internal Revenue to issue such order forms. Act of March 3, 1927 (44 Stat. 1381, Sections 4 (a) and 4 (b); Treas. Dec. No. 3999, issued March 18, 1927; Treas. Dec. No. 1 (Bureau of Prohibition), issued April 1, 1927; Act of June 14, 1930 (46 Stat. 585, Section 3 (b); Treas. Dec. No. 2 (Bureau of Narcotics), issued July 1, 1930; Section 2606, Title 26, I. R. C.; Treas. Dec. No. 4884, issued February 11, 1939."

With respect to the above holding, it is the contention of petitioner that Treasury Decision No. 2 (Bureau of Narcotics), issued July 1, 1930, and kept in force by Treasury Decision No. 4884, issued Feb. 11, 1939, delegates no authority whatever with respect to order forms to the Commissioner of Internal Revenue, but vests all authority therein delegated with respect to such forms in the Commissioner of Narcotics (Treas. Dec. No. 2, Sec. 3, subsection 1-a; Sec. IV); that the delegation of such authority to the Commissioner of Narcotics, and not to the

Commissioner of Internal Revenue, is required by the applicable statutes (I. C. R., Sec. 2606; U. S. Code, Title 5, Sec. 281-c, subsection a; U. S. Code, Title 5, Sec. 282-b, subsection a); and that any delegated authority, if the statutes confer such, that authorizes an administrative official to modify in an essential feature a statute that creates a criminal offense, would be an unconstitutional delegation of legislative power.

Sections 3, 4 and 5, these being the pertinent provisions of Treasury Decision No. 2, issued July 1, 1930, and the applicable statutes are set out in full in the accompanying brief.

Conviction of Petitioner Rests Upon an Arbitrary and Unconstitutional Application of the Statute.

The second question presented by this petition follows:

(2) Whether or not it is a violation of the federal statute for a physician, consulted by an habitual user of narcotics who is suffering intense pain, to prescribe narcotics for the relief of such suffering, whether caused by addiction alone or that and some other disease, when the quantity prescribed is not in excess of the reasonable requirements of the addict for a period of twenty-four hours and there is no probability that any part thereof will be used, and in point of fact none was used, by any person other than the addict.

Pertinent to the foregoing question is the testimony of a druggist that he was advised by a federal narcotic agent, also a witness in this case, that the federal law prohibited druggists from filling prescriptions, issued by a physician to addicts (R. 216), and that of Dr. Mc-

Laurin, *one of the expert witnesses for the Government who testified that "if a man came into his office very nervous from which he might die, and the witness knew he was an addict, he would not give him morphine," this being based on the understanding of that witness that administering morphine to or prescribing it for an addict was a violation of the federal statutes* (R. 134).

If we correctly construe the undisputed testimony, relating to the prescriptions issued Dezonia by petitioner, the judgment of conviction can only be sustained by adopting or acquiescing in the foregoing construction of the statute—a construction, as we conceive it, that is not only contrary to the uniform interpretation of the statute by this court but one that would render the statute unconstitutional as an attempt to regulate the practice of medicine with respect to the treatment of addicts.

The Circuit Court of Appeals did not, other than as may be implied from its affirmance of the judgment, indicate its view as to the proper construction and application of Section 2554 of the Internal Revenue Code, and exceptions thereto, relating to physicians.

We shall now briefly recite the undisputed facts that are deemed material in the consideration of the foregoing question and others hereinafter stated.

Material Facts.

It appears from the undisputed evidence:

That petitioner, 69 years of age, was a highly trained physician and surgeon (R. 148-149, 205); that he had owned and operated a hospital at Union City, Tennessee, from 1912 to the date of his trial; that during that period his practice had been extensive, including thousands of

operations, and successful (R. 46, 52, 88, 149); that he owned considerable real estate in and around Union City, which the Government attorney insisted had an assessed valuation of $250,000.00, and which petitioner was compelled to list over his protest during his cross-examination (R. 166-168); that narcotic prescriptions issued by him were not out of line with those issued by other doctors in the community (R. 45, 51, 59, 94, 115, 213, 217); and that he had a high personal and professional standing. (R. 200, 201, 221-231.)

The petitioner, consulted by Dezonia as a physician, prescribed narcotics for him for only a limited period of time (June 1-9, 1940), Dezonia being informed of such limitation; that petitioner advised him to go to a narcotic institution for treatment, which Dezonia agreed to do and submitted to petitioner a letter from such an institution in Lexington, Kentucky, showing that he had arranged to enter it when he completed his temporary work in Union City; that when each of the prescriptions was given to Dezonia he was suffering intense pain and the morphine sulphate was prescribed to relieve his suffering; that no prescription given Dezonia exceeded his reasonable requirements for a period of 24 hours; that there was no reasonable probability that any of the narcotics prescribed for Dezonia would be used by any other person, and none was so used; and that all prescriptions given were filled by a registered druggist and kept for inspection by narcotic officials (R. 113, 162, 163, 200, 245).

On one point, not important as we conceive the issues, there is a slight conflict between the testimony of De-

zonia and petitioner, this being the diseases other than addiction with which the addict was afflicted.

Dezonia, a government witness, testified there was nothing wrong with him "aside from the sinus trouble and drug habit" when he consulted appellant (R. 108); that when he came to petitioner's office on the occasions the prescriptions were issued he complained of intense pain (R. 115); that this "pain was felt in all parts of his body, which became very excruciating" (R. 113); that his sinus troubled him frequently and that it was "very severe" (R. 114, 115).

Petitioner testified that when he prescribed for Dezonia in June, 1940, the latter had enteritis and sciatica or neuritis; that he had pains in various parts of his body, "one day here and one day there"; that these pains were not solely the result of drug addiction (R. 198); that he gave the prescription to Dezonia "to control the pain and make him slightly useful" (R. 199).

The testimony as to Dezonia's condition when the prescriptions were given was restricted to his own testimony and that of petitioner.

Expert Testimony.

As to whether the course pursued by petitioner was "good practice" there was a conflict in the testimony of medical experts. Certain physicians, who testified for the Government, stated that they considered it bad practice to deliver morphine to an addict for self administration (R. 128, 143). Physicians, testifying for petitioner, stated that they considered it good practice to give to

an addict in the situation of Dezonia the quanties prescribed by petitioner (R. 235, 239, 240).

Two additional questions are presented by this application, and these we now state.

Third Question.

(3) Whether or not Section 2554 of the Internal Revenue Code can be so construed and applied as to punish a physician for prescribing a reasonable quantity of narcotics to a patient to relieve pain incident to addiction without rendering that Statute unconstitutional as a regulation of the practice of medicine in violation of the 10th Amendment to the Federal Constitution.

Fourth Question.

(4) Whether or not in the absence of any evidence of a generally accepted or recognized professional standard for the treatment of addicts, a finding that a prescription issued by a physician to an addict was not the course of his "professional practice only" may be predicated upon the conflicting opinions of medical experts as to what constitutes proper practice in such cases. Or, otherwise stated, may a finding of bad faith in prescribing drugs for an addict or the guilt or innocence of the accused be allowed to depend solely upon the choice a jury might make between the conflicting opinions of medical experts as to what constitutes the proper practice of medicine in cases where there is no evidence of a generally accepted or recognized professional standard?

REASONS WHY WRIT SHOULD BE GRANTED.

(1)

The offense created by Section 2554 of the Internal Revenue Code, as defined by this Court (Nigro vs. United States, 276 U. S. 332, 345, 351), is a sale that is not made on a "particular form of order" and both the "registered and unregistered seller" are "punished for not using the order forms as the statute requires, or for misusing them," and in sustaining the validity of an indictment that did not charge a sale that was not made on the particular form of order set forth in the statute, the Circuit Court of Appeals reached a conclusion that is in direct conflict with the applicable decision of this Court in Fleisher vs. United States, 302 U. S. 218-220.

(2)

In holding that Section 2554 of the Internal Revenue Code, creating and defining a criminal offense, could be modified in an essential thereof by Treasury Regulations, made pursuant to statutory authority, the Circuit Court of Appeals decided a question of general importance in the administration of criminal law in direct conflict with the applicable decision of the Circuit Court of Appeals for the 8th Circuit in St. Louis Merchants' Bridge T. Ry. Co. vs. United States, 188 Fed. 191-195, which, upon the authority of decisions of this Court therein cited, expressly holds that Congress cannot "*delegate its legislative power, its power to exercise the indispensible discretion, to make, to add to, to take from or to modify the law*".

The precise question decided by the Circuit Court of Appeals on the point under consideration had not thereto-

fore been expressly determined by this Court, a decision thereof being pretermitted in Swayne & Hoyt vs. United States, 300 U. S. 295-307, and Isbrandtsen-Moller Co. vs. United States of America, 300 U. S. 139-149, but the decision complained of seems to present a conflict with the principles pronounced by this Court in Panama Refining Company vs. Ryan, 293 U. S. 388-488, and Schechter vs. United States, 295 U. S. 495-555.

At any rate, the holding of the Circuit Court of Appeals with respect to the effect of the Treasury Regulations on Section 2554, presents a question of importance in the preparation of all indictments for violations of that statute, the importance thereof being emphasized by a consideration of the fact that the indictment in the instant case, alleging that the sale was not in pursuance of a written order on a form issued by the "Commissioner of Internal Revenue," followed the stereotyped form of narcotic indictments.

(3)

The Circuit Court of Appeals, in affirming the judgment and in denying the petition to rehear, necessarily construed the statute as either prohibiting a physician from prescribing for an addict at all or as regulating the quantity and the frequency of such prescriptions. In so applying the statute the Circuit Court of Appeals disregarded the construction thereof by this Court in Linder vs. United States, 268 U. S. 5, which holds that the statute does not attempt to prescribe methods for the treatment of addicts nor attempt to regulate the practice of medicine, and many other decisions of this Court which hold that the Act of December 17, 1914, commonly desig-

nated as the Harrison Narcotic Law, is a "registration and taxing Act" that does not prohibit a physician from prescribing narcotics for an addict for the "relief of suffering" incident to addiction nor attempt to prescribe methods for their medical treatment. United States vs. Jin Fuey Moy, 241 U. S. 394, 60 L. Ed. 1061; United States vs. Doremus, 249 U. S. 86, 63 L. Ed. 493; Webb vs. United States, 249 U. S. 96, 63 L. Ed. 497; Jin Fuey Moy vs. United States, 254 U. S. 189-192, (65 L. Ed. 214); State of Minnesota vs. Martinson, 256 U. S. 41, 65 L. Ed. 819; United States vs. Balint, 258 U. S. 250, 253, 254, 66 L. Ed. 604, 606; United States vs. Behrman, 258 U. S. 280, 66 L. Ed. 619; United States vs. Wong Sing, 260 U. S. 18, 67 L. Ed. 105; Linder vs. United States, 268 U. S. 5, 66 L. Ed. 819; United States vs. Daugherty, 269 U. S. 360, 70 L. Ed. 309; Boyd vs. United States, 271 U. S. 104, 70 L. Ed. 857; Alston vs. United States, 274 U. S. 289, 71 L. Ed. 1052; Nigro vs. United States, 276 U. S. 332, 72 L. Ed. 600; Casey vs. United States, 276 U. S. 413, 72 L. Ed. 632; Blockberger vs. United States, 284, U. S. 299, 76 L. Ed. 306.

(4)

A conviction without any evidence of the commission of a criminal or unlawful act, or under an unconstitutional statute, or by reason of an unconstitutional application of a valid law or under an indictment that does not state an offense, is a denial of due process and it appearing from undisputed evidence that the conviction had been obtained in violation of one or more of the principles stated, the Circuit Court of Appeals should have reversed the judgment regardless of objection or exception in the trial court and regardless of whether

such denial of due process was brought to its attention by the original assignments of error or by petition for a rehearing.

In failing so to do the Circuit Court of Appeals disregarded the principles pronounced by this Court in Fleisher vs. United States, supra; Brasfield vs. United States, 272 U. S. 448; Bowen vs. Johnston, 306 U. S. 19, 23, 83 L. Ed. 455; Johnson vs. Zerbst, 304 U. S. 458, 82 L. Ed. 1461; Re Neilson, 131 U. S. 176, 182, 33 L. Ed. 118.

(5)

There was no evidence of any generally recognized or accepted medical standard for the use of narcotics by physicians in the treatment of addicts. Medical experts, testifying for the Government, stated that it was not proper practice to prescribe narcotics for an addict to be administered by himself (R. 128, 129, 142). Medical experts, introduced by petitioner, testified to the contrary (R. 235, 239). This conflict in the situation thus stated raises a question of importance in the trial of narcotic cases that has not been determined by this Court, to-wit: Whether a finding of bad faith on the part of a physician, prescribing narcotics, can be predicated upon the conflicting opinions of medical experts as to what constitutes proper medical practice in a particular case. While the point has not been adjudicated, such a finding seems to be in conflict with the rule pronounced by this Court in American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94.

(6)

The indictment herein charges that petitioner was a "physician dispenser," and not that he issued as a practicing physician the prescriptions to which reference was therein made. A "dispensing physician," as that term is used in the statute, is a vendor of drugs (Young vs. United States, 62 S. Ct. 510, adv. sheets).

The evidence affirmatively established that petitioner did not sell narcotics (R. 199, 183), and there was neither claim nor evidence at the trial that he participated in any sale, legitimate or otherwise, except through the issuance of prescriptions as a practicing physician.

The question thus raised by the failure of the evidence to correspond to the allegations of the indictment raises a question that lies deeper than any mere variance, conviction for issuing the prescription being a conviction for an offense not charged in the indictment, and, therefore, a sheer denial of due process of law. Thornhill vs. State of Alabama, 310 U. S. 88.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket: Number 8955, Criminal, W. A. Nailling vs. United States of America, to the end that said case may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code (U.

S. C. A. Title 18, Section 347), and that the Judgment of the Court of Appeals for the Sixth Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

L. E. GWINN,
Counsel for Petitioner,
W. A. Nailling.